NO. 81-2110

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,

Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

BRIEF ON BEHALF OF APPELLEE, DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellee, Department of Treasury, State of New Jersey,
Hughes Justice Complex, CN 112,
Market and New Warren Streets,
Trenton, New Jersey 08625.
(609) 292-1516

JAMES J. CIANCIA,
Assistant Attorney General,
Of Counsel.

JOSEPH L. YANNOTTI,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 30 Park Place, Newark, New Jersey 07102—(201) 623-8611

Questions Presented

1. Does the Privileges and Immunities Clause of the Constitution of the United States foreclose a municipal government from requiring that its contractors undertake good faith efforts to employ a work force on municipal construction projects that includes municipal residents so that forty percent of the work performed will be performed by municipal residents.

2. Does a municipal regulation granting a limited preference to bona fide residents of the municipality in employment on public works contracts undertaken for the municipality represent a denial of equal protection to individuals who do not reside in the municipality.

3. Whether the Court has jurisdiction under Article III of the Constitution over a challenge to a provision of the Camden ordinance limiting enjoyment of the resident hiring preference to individuals who have resided in Camden for one year prior to an application for employment when the durational residency requirement has been eliminated by amendments to the ordinance adopted while this appeal has been pending in this Court.

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MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY,

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On Appeal from the Supreme Court of New Jersey

BRIEF ON BEHALF OF APPELLEE, DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY

Statement of the Case

This is an appeal from a portion of a final judgment of the Supreme Court of New Jersey entered in an action by the United Building and Construction Trades Coun-

cil of Camden County and vicinity (Council) challenging a determination by the Chief Affirmative Action Officer in the Department of Treasury of the State of New Jersey. By letter of November 24, 1980, the Chief Affirmative Action Officer approved an affirmative action program for construction contractors engaged in certain public works contracts for the City of Camden, New Jersey (A60 to A61).* The approved program stated that the contractor was to make every effort to employ persons residing in the City of Camden and went on to provide that "in no event, shall less than forty percent (40%) of the entire labor force be residents of the City of Camden" (A56). The program defined a resident of the City of Camden as any person who has been domiciled in the City for a continuous period of twelve consecutive months prior to the making of an application for employment (A38). The Council contended before the Supreme Court of New Jersey that the resident hiring requirements contravened the Constitution of the United States, invoking the Privileges and Immunities Clause, the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court of New Jersey rejected the Council's constitutional challenge and affirmed the Chief Affirmative Action Officer's approval of the Camden affirmative action program.

In 1975, the Legislature of the State of New Jersey enacted amendments to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-31 to 38. The enactment mandated that no public works contract be awarded by the State or any of its political subdivisions unless there has been agreement by the contractor to afford equal

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* The citations to the Appendix refer to the Appendix to the Jurisdictional Statement of the Appellant.

opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer. N.J.S.A. 10:5-32. The Act required certain prospective bidders on public works contracts to formulate and submit to the State Treasurer for his review and approval an affirmative action program whereby the contractor "guarantees minorities employment in all employment categories." N.J.S.A. 10:5-34. In N.J.S.A. 10:5-36, the State Treasurer was empowered to determine the percentage of minority groups in the State, or areas of the State from which the workforce for public contracts may be drawn, and to promulgate such percentages as guidelines for determining the adequacy of affirmative action programs submitted for approval. In addition, the Treasurer was authorized to require any State or local agency awarding public works contracts to submit their affirmative action programs for approval. N.J.A.C. 10:5-36(c).

In 1977, the State Treasurer promulgated rules and regulations governing the approval of affirmative action plans submitted by construction contractors. N.J.A.C. 17:27-6.1 to 6.5. Minority hiring goals were established for each of the State's 21 counties. N.J.A.C. 17:27-7.3. The regulations mandated the use of specific contract language whereby the contractor agreed to undertake good faith efforts to achieve the minority employment goals. N.J.A.C. 17:27-7.4. Other contractual provisions concerning compliance with the affirmative action plan as well as agreements not to engage in unlawful discriminatory employment practices were established as necessary elements of an affirmative action program. N.J.A.C. 17:27-6.2.

As an alternative to individualized review and approval of construction contract affirmative action plans, the Treasurer's regulations allowed any public agency of the State

to promulgate its own affirmative action program for construction contracts. A public agency program must be submitted to the State Treasurer for designation as a State approved program. N.J.A.C. 17:27-6.5(a). To secure State designation, the program must require the agency's construction contracts to include agreements against certain unlawful discriminatory employment practices, and must establish an employment goal for minorities which is not less than that prescribed for the county by N.J.A.C. 17:27-7.3. *See* N.J.A.C. 17:27-6.5(b). Once approved, the public agency's program exclusively establishes the affirmative action procedures and requirements for the public agency's construction contracts. N.J.A.C. 17:27-6.5(a).

In July of 1980, the City of Camden acted to establish a State-approved affirmative action program for construction contracts to be performed for or on behalf of the City. As indicated by the results of the 1980 census, at least 75%, and perhaps as many of 90%, of the City's residents are members of groups designated as minorities in the Camden program (A10).* The unemployment

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* Minority is defined in the Camden program to include Blacks, Hispanics, Women, Asians and American Indians (A37 to A38). The 1980 U.S. Census Bureau statistics indicate as follows concerning the Camden population:

Total Population	84,910
Caucasian	25,739
Black	45,008
American Indian/Eskimo	193
Asian/Pacific Islands	278
Other	13,692

A total of 16,308 Camden residents identified themselves as of Hispanic origin. It is unclear whether these individuals are reflected in any of the figures stated above with regard to other groups (A10).

rate for the City generally averages two or three times the national rate. The City of Camden has one of the highest uncollectible tax rates in the State of New Jersey. The residential tax base is small and consists of very modest homes. Industrial and commercial values in the City have declined over the last three decades. *See Camden* v. *Skokowski*, 88 N. J. 304, 305, 441 A.2d 741, 742 (1982).

On August 28, 1980 the Camden City Council adopted an ordinance to establish an affirmative action program for its construction contracts (A36 to A53). The ordinance stated that its adoption was prompted by the serious economic conditions confronting the significant minority population in the City. The ordinance stated that

> . . . the City Council of the City of Camden has been informed that unemployment State-wide is 8.1% and county-wide is 7.6%. The unemployment figures for the City of Camden, as given to the City of Camden by the Department of Labor of the United States, are 11.5%. However, at the last figures recorded by the State of New Jersey Department of Labor Affirmative Action Office, unemployment among Black Americans was 18.4% and unemployment among Hispanic-Americans was 15.6%. The latter figures were as of the end of 1977 and the Department of Labor has informed the City Council of the City of Camden that these particular figures have increased significantly. . . . [A36 to A37]

The ordinance indicated that its purpose was to relieve the problem of unemployment confronting the citizens of Camden and to promote involvement by members of minority groups in the City's construction projects (A37).

The Camden ordinance represented an affirmative action program which satisfied the minimum requirements for designation as a State-approved plan by the State Treasurer. The Camden plan provided that construction contractors were "to make every effort to employ not less than 25% minority workers" (A40 to A41). This minority hiring goal exceeded the 20% goal established by the State Treasurer for the County of Camden. *See* N.J.A.C. 17:27-7.3. The Camden affirmative action program also went beyond the minimum State requirements by inclusion of a provision whereby contractors were "to make every effort to employ persons residing within the City of Camden but in no event shall less than 40% of the entire labor force be residents of the City of Camden" (A56). The resident hiring preference was made part of the Camden plan by amendments to the August 28, 1980 ordinance adopted on September 11, 1980 (A54 to A56). The Camden program defined resident of the City of Camden to mean

> . . . any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the term of employment or contract. For purpose of this ordinance a resident must be a domicile of the City of Camden expressing an intention to make this City his permanent place of residence. [A38]

On November 24, 1980, the Chief Affirmative Action Officer for the State Department of Treasury approved the Camden program because it met the minimum requirements prescribed by N.J.A.C. 17:27-6.5(b) for designation as a State-approved plan. The Council appealed this determination to the Appellate Division of the Superior

Court of New Jersey. Prior to argument or decision in the Appellate Division, the Supreme Court of New Jersey assumed jurisdiction of the appeal by direct certification pursuant to N.J. Court Rule 2:12-1. The Council challenged the City's minority hiring goals on various State statutory and constitutional grounds and also contended that the minority hiring goals violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. In addition, the Council challenged the resident hiring requirements on the basis that they violated the Privileges and Immunities Clause, the Commerce Clause, and the Equal Protection Clause.

By decision entered on February 18, 1982, the Supreme Court of New Jersey rejected all of the contentions raised by the Council (A1 to A32). The Court ruled that the minority hiring goals were consistent with State statutory and constitutional law and did not violate the Equal Protection Clause.* The New Jersey Court also held that the resident hiring requirements did not contravene the Constitution of the United States (A21 to A28). With regard to the Commerce Clause, the Court concluded that in promulgating a resident hiring preference, the City was merely prescribing the terms and conditions of the City's participation in the construction market. The City was not regulating "the flow of commerce between private parties" (A22). Since the City was acting in the role of a market participant rather than as a market regulator, the Commerce Clause did not foreclose the City from promulgating a limited hiring preference for its own residents. The City's action, in the Court's view, fell squarely within the holdings of this Court in ***Reeves,***

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* The Council has not appealed from this part of the judgment of the Supreme Court of New Jersey. *See* Jurisdictional Statement at 10, n.19.

Inc. v. *Stake*, 447 U.S. 529 (1980) and *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976). The New Jersey Court's reading of *Alexandria Scrap* and *Reeves* was entirely in accord with this Court's decision last term in *White* v. *Massachusetts Council of Construction Employees, Inc.*, —— U.S. ——, 103 S.Ct. 1042 (1983), which held that the City of Boston may, as a market participant immune from scrutiny under the Commerce Clause, require that the construction work on City projects undertaken with City funds be performed by a work force comprised of at least 50% Boston residents.*

The Supreme Court of New Jersey also concluded that the City's resident hiring preference did not violate the Privileges and Immunities Clause. The purpose of the Clause is to place the citizens of each state upon the same footing as citizens of other States. As the Court stated

> For this reason the clause is not invoked to strike down local ordinances that favor city residents. Clearly, the Camden affirmative action plan does not aim primarily at out-of-state residents. It most certainly affects more New Jersey residents not living in Camden than it does out-of-state residents. Because the Camden ordinance does not affect "the States . . . treatment of each other's residents" [citing *Hicklin* v. *Orbeck*, 437 U.S. 518, 523 (1978)], it does not violate any privilege of state citizenship. . . . [A26]

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* The Council had initially sought review of the Supreme Court of New Jersey's conclusions concerning the Commerce Clause. However, in light of the Court's decision in *White*, it has abandoned its appeal on this issue. See Appellant's Brief, at 10, n. 25.

The Court therefore refused to apply the Privileges and Immunities Clause "in the context of a municipal ordinance that has identical effects upon out-of-state citizens and New Jersey citizens not residing in the locality" (A27).

Finally, the Supreme Court of New Jersey concluded that the resident hiring preference did not violate the Equal Protection Clause. The Court noted that residency requirements for municipal employees have been generally upheld as a rational means of furthering the City's public welfare. Like the right to a City job, the right to employment on a local public works job is not fundamental for purposes of equal protection analysis. The Court concluded that extension of the hiring preference to City residents would not violate the Equal Protection Clause if rationally based. In the Court's opinion, there was a rational basis for the preference because residency may supply an incentive for better performance as well as advance the economy of the locality (A27). In addition, the Court stated that the severe unemployment in the City of Camden, and the need for economic revitalization also support the rationality of the resident hiring preference (A28).

On June 23, 1983, the Camden City Council adopted an ordinance which amended the provisions of the City's affirmative action program as set forth in the ordinances adopted by the Council on August 28, 1980 and September 11, 1980. The newly enacted ordinance served to clarify the previous affirmative action plan and also to significantly modify certain provisions. In Section 4 of the 1983 ordinance, goals for employment were established for all construction contracts whose cost exceeds $50,000.00. The City's goals were that 25% of all work hours on a construction project be furnished by minority workers, and 40% of all work hours on the

project be furnished by City residents. Section 9 of the 1983 ordinance made clear that the contractor would be required to demonstrate that a good faith effort has been made to achieve both the minority and the resident hiring goals.* In addition, the 1983 ordinance indicated that the affirmative action program applied to

> Any agreement for the erection, repair or alteration of any building, structure, bridge, roadway or other improvement to real property which is funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant.

The affirmative action program enacted in 1980 had extended its coverage to all expenditures by the City for construction contracts, the extension of financial benefits, other than property tax abatements which exceed $50,000.00 in value, and to the development of residential housing of four units or more (A54 to A55). Finally, the 1983 ordinance amended the definition of a resident of the City of Camden to mean "any person who resides in the City of Camden," thereby removing the 12 month durational residency requirement as a prerequisite to enjoyment of the hiring preference.

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* In its February 18, 1982 opinion, the Supreme Court characterized the resident hiring preference as a "quota" (A21). This was so because the Camden plan's criteria for measuring good faith compliance with the minority hiring goals did not appear directly applicable to the resident hiring requirements. The Supreme Court said of the minority hiring goals that "The ordinance's criteria for good faith compliance confirm that the hiring goals are not immutable quotas" (A14). Since the 1983 amendments make good faith efforts the benchmark for compliance with the resident hiring requirements, it may fairly be said that they no longer have the flavor of an "immutable quota."

Summary of Argument

This appeal raises the question of the validity under the Privileges and Immunities Clause and the Equal Protection Clause of a resident hiring preference adopted by the City of Camden with respect to certain construction contracts undertaken for or on behalf of the City of Camden. When this matter was before the Supreme Court of New Jersey, the resident hiring preference was as set forth in two ordinances adopted by the City Council on August 28, 1980 and on September 11, 1980 (A36 to A58). These ordinances required that City residents fill 40% of the available positions on City construction contracts. The construction contracts to which this preference applied were those whose cost exceeded $50,000.00, and were contracts that involved the expenditure of public funds from any source, contracts in which the City had conferred a financial benefit on a party other than a property tax abatement, and contracts for the construction of residential housing of four units or more (A54 to A55). In addition, the ordinances established a durational residency requirement which limited the enjoyment of the resident hiring preference to individuals who resided in Camden for one year prior to an application for employment on a City construction project.

In June of 1983, the City Council amended its ordinances. The amendatory ordinance required that a construction contractor for the City undertake good faith efforts to meet the City's goal that 40% of the work hours on a City construction project be furnished by Camden residents. The City's resident hiring goal applied to City construction contracts funded in whole or in part by the City or funded with monies which the City administered in accordance with the terms of a grant. In addition, the June 1983 amendments provided for the deletion of the one-year durational residency requirement.

The Council's constitutional challenge to the Camden resident hiring preference must be considered in light of the 1983 amendments, and the Court must review the judgment below in light of the law "as it now stands, not as it once did." *Hall* v. *Beals*, 396 U.S. 45 (1969). Since the Camden ordinance no longer includes the one-year durational residency requirement, the Council's appeal on this issue is now moot. The Council's case as to the durational residency requirement no longer presents a live justiciable controversy and the Court is without jurisdiction under Article III of the Constitution to entertain this portion of the appeal.

The Council's challenge to the Camden resident hiring preference under the Privileges and Immunities Clause rests upon the contention that the Clause applies to classifications based upon municipal as well as state residency. Needless to say, no decision of this Court is cited to support such an interpretation of the Privileges and Immunities Clause. Indeed, the Court's decisions have considered the Clause only in the context of state statutes which classify individuals based upon the fact of *state* residence. The decisions reflect the long held understanding that the purpose of the Privileges and Immunities Clause is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship are concerned." *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869).

The Council's interpretation of the Clause is totally at variance with this long held view of the reach of the Clause and is also at odds with the underlying purpose of the Clause. It is well established that citizens may not challenge the laws of their own state on a claimed violation of the Privileges and Immunities Clause. *Slaughter House Cases*, 16 Wall. 32, 77 (1872). Accordingly, the Clause would not provide a basis for a resi-

dent of New Jersey who does not reside in Camden to challenge an ordinance granting a hiring preference to Camden residents. Were the Clause to be interpreted to allow residents of states other than New Jersey to challenge a hiring preference limited to Camden residents, individuals from other states will be permitted to stake a claim to rights which New Jersey residents living outside of Camden may not claim under the Constitution. The Privileges and Immunities Clause was designed to foster equality, not inequality, among the citizens of the states, and the goal of equality can be achieved only if the Clause is held to apply to state statutes which distinguish between residents of the *state*, and non-residents of the *state*.

Even if the Council's interpretation of the Clause is correct, the Camden resident hiring preference would nevertheless not contravene the Privileges and Immunities Clause. The Clause forecloses distinctions between non-residents and residents only with regard to "basic and essential activities, interference with which would frustrate the purpose of the formation of the Union." *Baldwin* v. *Montana Fish and Game Comm'n.*, 436 U.S. 371, 387 (1978). Individuals employed as workers on city construction projects are "working for the city," *White* v. *Massachusetts Council of Construction Employers, Inc.*, —— U.S. ——, 103 S.Ct. 1042, 1046, n. 7 (1983), and there is no fundamental right to governmental employment. *Massachusetts* v. *Murgia*, 427 U.S. 307 (1976). A municipal residency preference such as that adopted by Camden does not represent a virtual exclusion from the ability to pursue a common calling in the jurisdiction as was the case in *Toomer* v. *Witsell*, 334 U.S. 385 (1948). The ability to seek employment on all, rather than some, of the available jobs on the

City's construction projects is not therefore a "basic and essential activity" within the meaning of the Privileges and Immunities Clause. Moreover, the fact that the preference directly relates to contracts of a state or local government is a crucial factor to be considered in weighing the constitutionality of the resident hiring preference. The government's proprietary interest is clear. A hiring preference for residents of Camden, included as a condition to the City's contracts, is merely the exercise of a power that is an incident to the sovereignty of state and local governments. And in imposing such a condition to favor its own residents the City has not interfered with the exercise of an activity which bears "upon the vitality of the Nation as a single entity." *Baldwin, supra* at 383. The Clause was not designed to override the exercise of the sovereign power of state and local governments in this limited area of governmental contracting.

As the Council's challenge to the Camden resident hiring preference under the Privileges and Immunities Clause should fall, so too should its challenge under the Equal Protection Clause. The ordinance as amended in 1983 establishes a clear bona fide residency requirement. An individual need only reside in the City to qualify for the preference. The preference, as stated above, does not deny to nonresidents the exercise of any fundamental right. It need only be shown to be rationally based in order to pass muster under the Equal Protection Clause. *Martinez* v. *Bynum*, —— U.S. ——, 103 S.Ct. 1838, 1842, n. 7 (1983). The City clearly has an interest in seeing that its residents benefit from some of the employment opportunities created by the City's construction program. *Id.* 103 S.Ct. at 1842. This alone is a sufficient basis for adoption of the preference. It must be emphasized that Camden is a City with a minority population which

represents 75% to 90% of its total population. Unemployment in the City generally exceeds the national rate, and the unemployment among the minority population of Camden is particularly acute. In 1980, the City's unemployment rate was 11.5%. In 1983, the rate rose to 19.1%. Unemployment among the minority population has been even greater.

As the Supreme Court of New Jersey stated below, the resident hiring preference may gave City workers an incentive for better performance. It is designed to help reduce the severe unemployment problems among City residents, and it is designed as another means to advance the goal of fostering participation by minority workers in City construction projects. The resident hiring preference is justified by the need for economic revitalization in a City plagued by three decades of economic decline. Clearly the resident hiring preference is rationally based, and does not violate the Equal Protection Clause.

ARGUMENT

POINT I

The limited resident hiring preference established by the City of Camden for construction contracts performed for or on behalf of the City does not contravene the Privileges and Immunities Clause.

A. The Privileges and Immunities Clause does not apply to classifications drawn on the basis of municipal as opposed to state residency.

In its decision in this case, the Supreme Court of New Jersey concluded that the resident hiring preference for available jobs on construction contracts performed for

or on behalf of the City of Camden does not violate the Privileges and Immunities Clause. The Court held that the Clause does not foreclose the enactment of local ordinances that favor city residents because such regulations are not aimed primarily at those who reside in states other than the state in which the municipality is located. A resident hiring preference for Camden residents affects New Jersey residents who do not reside in Camden just as it affects residents of other states. The Camden ordinance does not deny to out-of-state citizens any privilege of citizenship shared by the citizens of New Jersey (A26). Clearly, the decision of the Supreme Court of New Jersey is in accord with the purposes of the Privileges and Immunities Clause and with the decisions of this Court.

The Privileges and Immunities Clause of the Constitution of the United States secures to the citizens of each state "all Privileges and Immunities of citizens in the several states." The Clause "establishes a norm of comity," *Austin* v. *New Hampshire*, 420 U.S. 654, 660 (1975), that is to prevail "among the states with respect to their treatment of each other's residents." *Hicklin* v. *Orbeck*, 437 U.S. 518, 523-524 (1978). The purpose of the Clause is "to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship are concerned." *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869). The Clause requires that with regard to those privileges and immunities "bearing upon the vitality of the nation as a single entity," the states must treat their own residents and residents of other states equally. *Baldwin* v. *Montana Fish and Game Comm'n.*, 436 U.S. 371, 383 (1978).

The history of the Privileges and Immunities Clause makes clear that the Clause was designed to further

the development of a single nation from separate and individual states. The source of the Clause was the fourth Article of Confederation which provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively. . . .

The fourth Article was intended to arrest a "centrifugal tendency" among the confederated states, and the Article was carried over into the Constitution with the apparent design to strengthen the Union. *Austin* v. *New Hampshire, supra* at 660-661. Indeed, James Madison had commented concerning a plan of union proposed by William Paterson:

> Will it prevent trespasses of the States on each other? Of these enough has already been seen. He instanced Acts of Virginia and Maryland which give a preference to their own citizens in cases where citizens [of other States] are entitled to equality of privileges by the Articles of Confederation. [1 M. Ferrand, *Records of the Federal Convention* 317 (1911)]

The disunity which so concerned the framers was that resulting from certain regulatory actions by the states

of state-wide impact which could hinder the development of a single Union. This "centrifugal tendency" among the states could result in distinctions drawn by a state between its own citizens and citizens of other states. Such distinctions, to the extent that they involved "privileges" and "immunities" which bear upon the "vitality of a nation as a single entity," *Baldwin* v. *Montana Fish and Game Comm'n., supra* at 383, could undermine the goal of forming a single Union from individual sovereign states. There is no indication that the framers were animated by any concern other than the extension by a *state* of certain "privileges" and "immunities" to its citizens and the denial of the same to the citizens of all other states.

The decisions of the Court are entirely in accord with this view of the scope and meaning of the Clause. As the Court explained in *Paul* v. *Virginia, supra* at 180:

> . . . The privileges and immunities secured to citizens of each State in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their Constitution and Laws by virtue of their being citizens.

And, in *Woodruff* v. *Parham,* 8 Wall. 123, 147 (1869), the Court stated:

> The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not,

> therefore, an attempt to fetter commerce among the States, or deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama.

More recently, in *Toomer* v. *Witsell*, 334 U.S. 385 (1948), the Court stated that the Clause was designed "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Id.* at 395. Chief Justice Vinson noted that the Clause was not absolute but nonetheless did foreclose "discrimination against *citizens of other States* where there is no substantial reason for the discrimination *beyond the fact that they are citizens of other States.*" *Id.* at 396 (emphasis added). The *Toomer* Court made plain that the Clause proscribed classifications based upon non-citizenship "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 398.

The decision of the Court in the *Slaughter House Cases*, 16 Wall. 32 (1872) should lay to rest any notion that the Clause applies to anything other than distinctions drawn on the basis of *state* citizenship. The Court made clear that the Clause could not be invoked by citizens of a State to challenge the laws of their own State. This was so because the Privileges and Immunities Clause did not create rights deemed to be fundamental "privileges" and "immunities," and did not limit a State's power to define the rights of its own citizens. The sole purpose of the Clause

> . . . was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same,

> neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction. . . . [*Id.* at 77]

The protections of the Clause extend only to citizens of states other than those in which the recognized "privileges" and "immunities" are claimed or exercised, *ibid;* and the Clause protects such individuals from the denial of those "privileges" and "immunities" when there is no substantial reason for the denial other than the fact that they are citizens of other states. *Toomer* v. *Witsell, supra* at 396.

In light of the above, it is hardly surprising that the Privileges and Immunities Clause has only been considered by the Court in the context of classifications drawn on the basis of *state* residency. In *Hicklin* v. *Orbeck, supra,* the Court held that an Alaska statute which required the employment of qualified Alaska residents in preference to residents of other states in the performance of certain oil and gas related contracts was violative of the Privileges and Immunities Clause. Similarly, in *Austin* v. *New Hampshire, supra,* the New Hampshire Commuter Income Tax was declared to be in violation of the Clause because it fell exclusively upon the income of non-residents of the State of New Hampshire. *See also Doe* v. *Bolton,* 410 U.S. 179 (1973), (Georgia statute limiting the availability of abortion services to Georgia residents violates the Privileges and Immunities Clause); *Baldwin* v. *Montana Fish and Game Comm'n., supra,* (Montana statutory elk-hunting license scheme imposing higher license fees on non-residents of Montana not within the category of rights protected by the Clause); *Toomer* v. *Witsell, supra,* (South Carolina statute requiring non-residents of South Carolina to pay a fee 100 times greater than that required of South Carolina resi-

dents for a commercial shrimp license contravened the Clause); *Canadian Northern Ry. Co.* v. *Eggen*, 252 U.S. 553 (1920) (Minnesota statute establishing shorter period for the commencement of certain civil actions by nonresidents of Minnesota than that applicable to Minnesota residents not violative of the Privileges and Immunities Clause); *Blake* v. *McClung*, 172 U.S. 239 (1898), (Tennessee statute contravened the Privileges and Immunities Clause when it granted Tennessee residents preference in the distribution of assets of certain corporations); *Ward* v. *Maryland*, 12 Wall. 418 (1871), (Maryland Law which required those not permanent residents of Maryland to obtain a license to sell goods other than those produced or manufactured in Maryland violated the Clause); *Paul Virginia*, *supra*, (Virginia law requiring insurance companies not incorporated under Virginia law to secure a license to do business from Virginia not violative of the Privileges and Immunities Clause).*

In this case, the Supreme Court of New Jersey was correct in its conclusion that the Privileges and Immunities Clause did not apply to a local ordinance favoring municipal residents. The hiring preference for Camden residents is not aimed primarily at out-of-state residents. The preference is denied to New Jersey residents who do not reside in Camden just as it is denied to residents of Pennsylvania and Delaware. Where, as here,

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* The decisions of the Supreme Court of New Jersey are also consistent with this interpretation of the Privileges and Immunities Clause. *See Salorio* v. *Glaser*, —— N.J. ——, ——A.2d ——(1983) (New Jersey Emergency Transportation Tax which fell only on residents of New York violated the Privileges and Immunities Clause); *Rubin* v. *Glaser*, 83 N.J. 299, 416 A.2d 833 (1980), app. dism. 449 U.S. 977 (1980) (State law granting property tax rebates for homesteads of New Jersey citizens and residents only did not violate the Clause).

citizens from *all* of the states of the nation are included in the class that is denied a preference, it cannot be said that the classification is one which raises the spectre of national disunity that so concerned the framers of the Privileges and Immunities Clause. The Camden ordinance does not involve a "discrimination *against citizens of other States* where there is no substantial reason for the discrimination *beyond the fact that they are citizens of other States.*" *Toomer* v. *Witsell, supra* at 396 (emphasis added).*

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* The Council cites several cases wherein lower courts applied the Privileges and Immunities Clause to classifications of local rather than state-wide application. See Appellant's Brief at 32-33, n. 50. However, the decided cases are not uniform and other courts have reached a contrary conclusion. In *Barker Printing Co.* v. *Local No. 734, Brotherhood of Painters,* 12 F.2d 945, 949-950 (D.N.J. 1926), the court stated:

> Had the rule in question drawn a specific line of demarcation, basing its operation avowedly upon differences in state citizenship, I can conceive that such differentiation would constitute an unlawful and forbidden discrimination; but as I read the rule, it is not subject to that interpretation, concerning itself in nowise with state lines, but applying to anybody and everybody who essays to do business outside his home city, whether it be in a neighboring town in his own state, or in some distant foreign jurisdiction. In other words, this rule applies with equal force and effect to everybody, regardless of state residence, who is similarly situated, and in such application, I take it, frees itself of the charge of effecting an unlawful discrimination.

In *Rothermel* v. *Meyerle,* 136 Pa. 251, 20 A. 583, 587 (Sup. Ct. Pa. 1890), the court stated as follows:

> . . . Article 4, §2, of the federal constitution, provides that the citizens of each state are entitled to all the privi-

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The Council contends that the decision of the Supreme Court of New Jersey should be reversed because the Privileges and Immunities Clause applies to classifications based on municipal as well as state residency. The Council is an association of labor unions whose members include persons who reside in Camden, persons who reside in New Jersey although in places other than Camden, and persons who reside in States other than New Jersey (Appellant's Brief at 4-5). The contention that the Camden resident hiring preference violates the Privileges and Immunities Clause can only be asserted on behalf of those who live outside of the State of New Jersey. *Slaughter House Cases, supra.* Since the Camden hiring preference is denied to a class of persons that include residents of *all* states, this challenge to the ordinance under the Privileges and Immunities Clause is based upon the contention that the ordinance may not be *applied* to citizens of states other than New Jersey. Thus, the Council is asserting in this case, on behalf of some of its members, that citizens of all states except New Jersey may not be denied a claimed "privilege" that is not shared equally by all citizens of New Jersey. These out-of-state citizens are claiming a constitutional right to a "privilege" which citizens of New Jersey who do not reside in Camden may not claim from

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leges and immunities of citizens of the several states. Citizens of other states, therefore, must be accorded the same rights under our laws as the citizens of Pennsylvania. But the discrimination contained in the act of 1861 is not against citizens of other states more than the citizens of our own state, nor against foreign markets more than domestic markets. It is directed not against citizens of other states, but against non-residents of the county of Berks, and against markets outside of that county.

the State of New Jersey under the Privileges and Immunities Clause. The result which the Council seeks is to accord to out-of-state citizens rights which are more expansive than those exercised by all New Jersey citizens who do not reside in Camden.

The result which the appellant seeks in this case cannot be squared with the fundamental purpose of the Privileges and Immunities Clause. The Clause is designed to place the citizens of each state upon an equal footing with citizens of other states with regard to certain basic "privileges." *Paul* v. *Virginia, supra.* The Clause was not designed to give out-of-state citizens rights to exercise "privileges" which some citizens of the state in which the claim is asserted do not exercise, and can not demand. The purpose of the Privileges and Immunities Clause was not to promote inequality among the citizens of the several states, and its purpose of placing the citizens of the several states upon an equal footing can not be advanced if the Clause is held to apply to any "privilege" which is not extended to all citizens of a state.

In support of its argument that the Clause must apply to classifications based upon municipal as well as state residency, the Council contends that a municipality may not engage in action that would be unconstitutional if undertaken by the state (Appellant's Brief at 26). While it is true that the City of Camden, as a political subdivision of the State of New Jersey, is subject to the State's legislative control, this does not alter the plain fact that the Camden hiring preference is limited to Camden residents. For purposes of the Privileges and Immunities Clause, the question is of the scope and applicability of the resident hiring preference. A state could clearly legislate a resident hiring preference for

all local construction projects that was limited to residents of the locality in which the project is undertaken.* Such legislation would not involve a discrimination aimed at residents of other states. And, as argued in part (b), even when a state does legislate a hiring preference for all of its residents and denies the preference to citizens of all other states, a state does not trench upon the exercise of a basic or essential activity which bears upon the vitality of the nation as a single entity and the preference does not violate the Privilege and Immunities Clause.**

The Council also argues that the Privileges and Immunities Clause will be nullified if its application is limited to classifications based on *state* residency. It is suggested that the unity of the nation could be undermined by actions of independent municipalities just as by the action of sovereign states (Appellant's Brief at 29-30). The Council posits a scenario where each municipality of the State of New Jersey enacts a hiring prefer-

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* The Boston Executive Order challenged in *White* v. *Massachusetts Council of Construction Employees, Inc.*, —— U.S. ——, 103 S.Ct. 1042 (1983), was derived from a State statute encouraging Massachusetts communities to institute similar measures. See *White, supra*, 103 S.Ct. at 1053 (Blackmun, J., dissenting).

** Under N.J.S.A. 34:9-2, citizens of New Jersey are entitled to a preference in employment for construction of any public work undertaken for "the State, or any county, city, town, township or borough, committee, commission or any board, committee, commission or officer thereof." This Act was declared to be a violation of the Privileges and Immunities Clause in *Neshaminy Constructors, Inc. Krause*, 181 N.J. Super. 367, 437 A.2d 733 (Ch. Div. 1981), aff'd —— N.J. Super. —— (App. Div. 1982). An appeal from that judgment is now pending in the Supreme Court of New Jersey, and the Attorney General of New Jersey is contending in that case that the Act is constitutional.

ence for its own residents on local public works projects with the result that residents of each city in New Jersey can work in their own city and inhabitants of Delaware and Pennsylvania can work nowhere in New Jersey. This could lead to what the Council calls "back-door" balkanization.

The appellant's argument falls wide of the mark. When a single municipality adopts a resident hiring preference for the municipality's construction projects, its action simply does not raise the spectre of the dissolution of the nation into "a league of states." *Paul* v. *Virginia, supra* at 180. Indeed, the Council seems to concede as much by suggesting that the so-called threat of national disunity would arise only if the action of the municipality is taken in concert with every other municipality of the state. Under the Council's extreme hypothetical, scrutiny under the Clause would be triggered by uniform municipal regulations which have, at least as far as out-of-staters are concerned, a state-wide impact. Even were it to be concluded that in these limited circumstances scrutiny under the Privileges and Immunities Clause might be warranted, certainly the regulation at issue in this case in no way approaches the sort of regulatory scheme envisioned by the appellant.*

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* The Council suggests that an expansive interpretation of the Privileges and Immunities Clause is justified by what it calls the "analagous situation" in *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951). (Appellant's Brief at 34). That case held that certain municipal regulations on the sale of milk violated the Commerce Clause in that they served to practically exclude the sale of out-of-state milk in the City. *Dean Milk* is not analagous. That case made clear that municipal regulations may burden interstate commerce and violate the Commerce Clause. Simply because municipal regulations of interstate commerce are

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The appellant also relies upon Justice O'Connor's concurring opinion in *Zobel* v. *Williams*, —— U.S. ——, 102 S.Ct. 2309 (1982), a case concerning an Alaska statutory scheme which provided for the annual distribution of state funds to Alaska residents. Under the Alaska law, each adult resident received a dividend unit for each year of residency subsequent to 1959. The Court held that the distribution scheme violated the Equal Protection Clause. In Justice O'Connor's view, the Alaska scheme violated the Privileges and Immunities Clause because the Alaska statutes classified Alaska citizens on the basis of their former residential status. As Justice O'Connor stated, "Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the state on less favorable terms than those who arrived earlier." *Id.*, 102 S.Ct. at 2321.

An ordinance, like that adopted by the City of Camden, is clearly distinguishable from the Alaska statutory scheme at issue in *Zobel*. The distinction drawn in the Alaska statutes could be said to have been based upon the fact of non-residency in the State of Alaska. The Alaska law established a preferred class of Alaska residents including only those who resided in the State in 1959. All residents of other States who migrated after that time were placed in less-favored classes depending

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subject to scrutiny under the Commerce Clause does not mean that the Privileges and Immunities Clause must be read as applying to all classifications based on residency, whether municipal or state. If the Council is contending that the reach of the Commerce Clause and the Privileges and Immunities Clause are the same, then it should be prepared to concede that the exception for state and local governments under the Commerce Clause when participating in the market should similarly apply under the Privileges and Immunities Clause. *White, supra.*

upon the date of migration. Thus what might be called a "privilege" was extended to all who were Alaska residents in 1959, and denied to all who later moved to Alaska from other States after that date. The extent of the denial was lessened, not eliminated, to the extent the migration occurred in each succeeding year after 1959. A preference granted to municipal residents, on the other hand, is not based upon an individual's status as a citizen of a state either now or in the past. In the context of the Camden ordinance, a person may move from Pennsylvania to a New Jersey municipality other than Camden. The resident hiring preference would not extend to that person because the individual is not a resident of Camden *not* because the individual moved from another State. Accordingly, Justice O'Connor's views of the reach of the Privileges and Immunities Clause would not extend to the ordinance at issue in this matter.

In sum, the Supreme Court of New Jersey was clearly correct in its conclusion that the Privileges and Immunities Clause did not apply to a classification based on municipal residency. Its decision was consistent with the long held understanding of the reach of the Clause and the decisions of this Court. The judgment of the Supreme Court of New Jersey should therefore be affirmed.

B. Even if the Privileges and Immunities Clause is held to apply to classifications based upon municipal as well as State residency, the Clause does not foreclose a municipal government from requiring its contractors to make good faith efforts to employ a work force that includes municipal residents so that a percentage of the construction work for the municipality will be performed by municipal residents.

In *White* v. *Massachusetts Council of Const. Employers, Inc., supra,* the Court concluded that the Commerce Clause did not stand as a bar to the enforcement of an executive order by the Mayor of the City of Boston which required that all construction projects funded in whole or in part with City funds, or funds which the City was empowered to administer, should be performed by a work force comprised of at least 50% Boston residents. As to those projects undertaken by the City with its own funds, the Court concluded that the City was acting as a participant in the market rather than in the role of a market regulator. The executive order was therefore held to be within the exception from the constraints of the Commerce Clause enunciated in *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and in *Reeves, Inc.* v. *Stake, supra.* As the Court stated in *Hughes,* there is "nothing in the Commerce Clause [that] prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes* v. *Alexandria Scrap Corp., supra* at 810.

It is undisputed that the resident hiring preference in the Camden ordinance at issue in this case is virtually indistinguishable from that at issue in *White.* The Council has therefore declined to press its Commerce Clause challenge to the Camden ordinance. (Appellant's Brief at 10, n. 25). The Council nonetheless urges the Court to find what was constitutional under the Commerce

Clause to be unconstitutional under the Privileges and Immunities Clause. Notwithstanding the Council's arguments to the contrary, the Privileges and Immunities Clause, like the Commerce Claues, does not stand as a bar to a municipal government's requiring its contractors to undertake efforts to employ municipal residents in the performance of construction projects for or on behalf of the municipality.

The Court, in *Baldwin* v. *Montana Fish and Game Comm'n, supra,* emphasized that state citizenship or residency may be used by a state to distinguish among persons and the Privileges and Immunities Clause erects no absolute bar against such distinctions. A state is not required by the Clause to make all of its services or resources available to all, resident or nonresident, on an equal basis. *Cf. Reeves, Inc.* v. *Stake, supra.* As Justice Blackmun wrote for the Court in *Baldwin*:

> Some distinctions between residents and nonresidents merely reflect the fact that this is a nation composed of individual states, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those states. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the nation as a single entity must the State treat all citizens, resident and nonresident, equally [*Baldwin* v. *Montana Fish and Game Comm'n, supra* at 383]

The Privileges and Immunities Clause forecloses "unnecessary distinctions" between residents and nonresidents *only* with respect to the exercise of certain clearly defined fundamental rights. These fundamental rights are "basic and essential activities, interference with which would frustrate the formation of the Union." *Id.* at 387.

In limiting the enjoyment of the hiring preference to its own residents, Camden has clearly not trenched upon any fundamental right protected by the Privileges and Immunities Clause. The right of individuals to seek employment on construction projects undertaken for the City of Camden is clearly not a fundamental right for purposes of the Privileges and Immunities Clause. The right of governmental employment per se is not fundamental. *Massachusetts* v. *Murgia*, 427 U.S. 307, 313 (1976). Although the individuals employed as construction workers on the City's projects are direct employees of the City's contractors, rather than the City, this is a distinction without a constitutional difference. Here, as in *White* v. *Massachusetts Council of Construction Employers, Inc., supra*, all individuals employed by the City's contractors, are for all practical purposes, "working for the city." *Id.*, 103 S.Ct. at 1046, n. 7. *See also People ex rel. Holland* v. *Bleigh Construction Co.*, 61 Ill. 2d 258, 335 N.E. 2d 469 (1975) (Illinois statute granting employment preference for Illinois residents on public works projects does not violate the Privileges and Immunities Clause).

Notwithstanding the Court's holding in *White*, the Council insists that this case involves the right to pursue a common calling. But this clearly is not so for the right claimed in this matter is simply the right to pursue a common calling on a construction project for the City of Camden. While the right of a nonresident to pursue a common calling in a state other than his own has been held to be a right protected by the Privileges and Immunities Clause, *Toomer* v. *Witsell, supra*, (Commercial shrimping a common calling), the right of a nonresident to pursue his livelihood through employment on a construction project performed for a governmental entity in a state other than his own it not. No decision of this Court so holds. Indeed the Court's holding in

McCarthy v. *Philadelphia Civil Service Comm'n.*, 424 U.S. 645 (1976), militates against such a conclusion. There the Court rejected a constitutional challenge to a continuing residency requirement for employment on a city fire department. The individual had moved his permanent residence from Philadelphia to New Jersey and challenged his dismissal as violative of the Equal Protection Clause. As the Court stated:

> In this case appellant claims a constitutional right to be employed by the City of Philadelphia *while* he is living elsewhere. There is no support in our cases for such a claim [*Id.* at 646-647, emphasis in original].

See also Detroit Police Officer's Ass'n. v. *Detroit*, 385 Mich. 519, 190 N.W.2d 97 (1971), app. dism. 405 U.S. 950 (1972).

Although the Appellant places substantial reliance upon the decision in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), that case too does not support the contention that the Privileges and Immunities Clause secures the right to pursue a livelihood on construction projects undertaken for or on behalf of the City of Camden. In *Hicklin*, Alaska had legislated a resident hiring preference with respect to certain oil and gas leases that extended, as the Court stated:

> . . . to employees who have no connection whatsoever with the State's oil and gas, perform no work on State land, have no contractual relationship with the State, and receive no payment from the State. The Act goes so far as to reach suppliers who provide goods or services to subcontractors who in turn, perform work for contractors despite the fact that none of these employers may

> themselves have direct dealings with the State's oil or gas or ever set foot on State land . . . [*Id.* at 530]

The Court stated further that a state's ownership of property is often "*the* crucial factor" (emphasis added) to be considered in determining whether a discrimination against non-residents violates the Privileges and Immunities Clause. Although the ownership factor may be dispositive in many cases, it was not depositive in *Hicklin* because Alaska had "little or no proprietary interest in much of the activity covered by the Alaska statute." *Id.* at 529.

In this case, the City's proprietary interest is clear and the resident hiring preference is strictly limited on this basis. The hiring preference applies only to a designated percentage of the employment opportunities on the City's construction projects. No individual is absolutely excluded from pursuing his or her livelihood in the City of Camden and there is no total exclusion of nonresidents from *all* employment opportunities on the Camden projects.* This is not, then, a case like *Hicklin* where a State or local government has legislated a hiring preference for its residents which extends to contractual arrangements where the City as "little or no proprietary interest." *Ibid.*

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* The appellant states that the Camden resident hiring preference denies to out-of-state residents access to a "significant" portion of the employment opportunities in Camden. There is nothing in the record to support that statement. There are no facts in the record of this case to explain what effect, if any, the Camden hiring preference has had upon non-residents of New Jersey. The record does not disclose whether any members of labor organizations represented by the Council has ever been denied employment on a Camden construction project by reason of the operation of the resident preference challenged in this case.

Hicklin's recognition that a state's proprietary interest in its own contractual arrangements as a limit to the reach of the Privileges and Immunities Clause was in accord with the decision in *Baldwin* v. *Montana Fish and Game Comm'n, supra*, where the Court also emphasized that a state's ownership of a resource is a critical factor to be considered in determining whether a state must permit residents and nonresidents to share equally in the enjoyment of the state's resource. It had earlier been held that the Privileges and Immunities Clause did not apply to a state's regulation of that which it owned. In *Corfield* v. *Coryell*, 6 F.Cas. 546, 552 (No. 3, 230 C.C. E.D. Pa. 1825), Justice Washington, sitting as Circuit Justice, concluded that while the Clause foreclosed the states from interfering with the right of a citizen of one state to pass through another for purposes of trade, the Clause did not bar the State of New Jersey from limiting access to oyster beds owned by the State to its own residents.

The *Baldwin* Court explained that the Court's more recent cases has indicated that a state's power to regulate that which it owns may need to give way to the limitations of the Commerce Clause, a proper exercise of federal power, or a right of a nonresident protected by the Privileges and Immunities Clause. *Id.* at 386. Even so, the *Baldwin* Court refused to discard the ownership principle, a principle grounded upon considerations of state sovereignty and upon the fact that "this is a nation composed of individual states." *Id.* at 383.

It is important to note that the Court has long viewed the power of State and local governments over their own contracting arrangements as broad. A governmental entity retains the power "to determine those with whom it will deal, and to fix the terms and conditions upon which

it will make needed purchases." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940). And in *Atkin* v. *Kansas*, 191 U.S. 207, 222 (1903), the Court said that it "belongs to the State as guardian and trustee for its people to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *See also Heim* v. *McCall*, 239 U.S. 175, 191 (1915). By incorporating a resident hiring preference as a term in its construction contracts, the City has done no more than act consistently with this recognized power and with the essential purpose of all governments to serve its citizens. *Reeves Inc.* v. *State, supra*, at 442.

In this area of employment upon state and local public works projects, the ownership principle removes a state from any mandate under the Privileges and Immunities Clause to "apply all of its laws or all its services equally to anyone, resident or nonresident." *Baldwin, supra* at 383. The right of employment in this limited area of economic activity is not fundamental. Since the projects are sponsored by state and local governments, considerations of state sovereignty suggest that the pursuit of employment opportunities on the governmental projects is not an activity which would frustrate the formation of the Union. Rather, deference to the State's proprietary interest in this area only reaffirms the basic principle of the federal system established by the Constitution that this nation is a nation composed of individual states. *Id.*

A limitation upon the reach of the Clause in this limited area is also entirely consistent with the Court's decisions under other constitutional provisions dealing with state regulation of its own property and resources. Only last term, in *Martinez* v. *Bynum*, —— U.S. ——, 103 S.Ct. 1838 (1983), the Court upheld a Texas statute which denied free admission to public schools for a minor

living apart from parents, guardians or others having lawful control, if his presence in the school district is for the primary purpose of attending the free public schools. The residency requirement "further[ed] the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." *Id.*, 103 S.Ct. at 1842. *See also Vlandis* v. *Kline*, 412 U.S. 441 (1973), (State has a legitimate interest in protecting the right of its bona fide residents to attend its colleges and universities on a preferential tuition basis); *Reeves, Inc.* v. *State, supra*, (State may, in times of shortage, limit sales of cement produced at State-owned plant to State residents); *American Yearbook Co.* v. *Askew*, 339 F.Supp. 719 (M.D. Fla. 1972) (three-judge court), summarily aff'd 409 U.S. 904 (1972) (State may require that all public printing be performed in the State).*

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* The Court of Appeals of New York in *Salla* v. *County of Monroe*, 48 N.Y. 2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979), *cert.* den. sub. nom. *Abrams* v. *Salla*, 446 U.S. 909 (1980), held that the Privileges and Immunities Clause was violated by a New York law which mandated preferential employment of New York citizens on public works projects. The New York Court rejected the state ownership theory as an exception to the Clause and its decision was based largely upon the fact that the project at issue in the case was financed by the federal government. The Court appears to have given no consideration to the specific federal conditions attached to the funding. Its conclusion is therefore of questionable validity because applicable federal regulations may sanction local hiring preferences. *White, supra*, 103 S.Ct. at 1047. The New York Court also gave no consideration to the decisions which hold that there is no fundamental right to governmental employment. In addition, the Court of Appeals took the view that the state ownership principle did not override the right of a citizen of one state to pursue his vocation in another. But the New York statute did not foreclose absolutely the pursuit of a commercial livelihood. It merely denied out-of-state

(Footnote continued on following page)

The Council argues that the fact that Camden, like Boston in *White* v. *Massachusetts Council of Construction Employers, Inc., supra,* is acting as a market participant when including a resident hiring preference as a term of its construction contracts, should not relieve the City from the contraints of the Privileges and Immunities Clause. The Council contends that there are "vital differences" between the reach and purposes of the Privileges and Immunities Clause and the Commerce Clause under which the Boston executive order was reviewed in *White.* In the Council's view, the Privileges and Immunities Clause proscribes all distinctions based on residency, and in weighing such distinctions the characterization of the government's role is irrelevant. (Appellant's Brief, at 42-43).

The Council's arguments are clearly without merit. The Privileges and Immunities Clause is not absolute, *Toomer* v. *Witsell, supra* at 396. The Clause does not proscribe *all* classifications based on state citizenship or residency. *Baldwin* v. *Montana Fish and Game Comm'n, supra* at 383. A government's role as a market participant is clearly not irrelevant because the Court has recognized the continuing validity of the state ownership principle as a limitation upon the reach of the Privileges and Im-

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residents a right to pursue a vocation in a limited area of commercial activity sponsored by the state and local governments of New York. As Judge Gabrielli stated in dissent:

> . . . The statute does not prevent out-of-State laborers from coming into the State and securing jobs in their accustomed field; rather it simply establishes as a matter of public policy, that when the State of New York enters the market place as a purchaser of services, it will use its bargaining power to promote the interests of its citizens [*Id.,* 48 N.Y.2d at 528, 423 N.Y.S.2d at 885]

munities Clause. *Baldwin, supra* at 384-387; *Hicklin* v. *Orbeck, supra* at 529. Thus, the decision in *White* cannot be simply dismissed. Indeed, *Hicklin* v. *Orbeck, supra,* underscored the relationship between the Privileges and Immunities Clause and the Commerce Clause. Both constitutional provisions reflect a "shared vision of federalism." *Id.* at 532. The "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause suggests that there should be no difference between the conclusion reached in *White* under the Commerce Clause and the conclusion reached in this case under the Privileges and Immunities Clause.

This is particularly true where there is absolutely no difference in the underlying contentions. Here the argument is made that individuals are constitutionally permitted to pursue their livelihoods on municipal construction projects unencumbered by any preference favoring municipal residents. Here the argument is made that a resident hiring preference for local construction projects undermines the free flow of trade in the national marketplace. But there is no reason why these same contentions should succeed under the Privileges and Immunities Clause where they failed under the Commerce Clause. In this case, as in *White,* the Court should hold that the Constitution does not foreclose a municipal government from preferring its own residents to the extent that the municipal government, by reason of its own contracting arrangements, makes employment opportunities available on public works projects undertaken for the municipality.

POINT II

The appellant's challenge to the durational residency requirement of the Camden hiring preference is moot since the City has eliminated the durational requirement by amending the ordinance and the ordinance as amended establishes a bona fide residency requirement that does not contravene the Equal Protection Clause.

A. The Court is without jurisdiction under Article III of the Constitution to consider the Appellant's challenge to the durational residency requirement of the Camden hiring preference because the amendments to the Camden ordinance have eliminated the durational feature of the resident hiring preference and the issue is now moot.

As stated above in the Statement of the Case, the City Council of the City of Camden adopted an ordinance on June 23, 1983 which amended the ordinances which were considered by the Supreme Court of New Jersey in its decision of February 18, 1982. The June 23, 1983 ordinance superceded the prior ordinances adopted on August 14, 1980 and September 11, 1980 and changed the definition of a resident of the City of Camden to delete the requirement that an individual be domiciled in the City for twelve months prior to an application for employment on a City construction project in order to qualify for an employment preference as a City resident (A38). The amended ordinance defines a resident of the City as "any person who resides in the City of Camden." This change renders the appellant's challenge to the durational residency requirement moot, deprives the Court of jurisdiction under Article III of the Constitution, and requires the dismissal of this portion of the appeal.

The judicial power of the Courts of the United States under Article III of the Constitution extends only to "cases or controversies." The federal courts may act only if the "case or controversy" is "justiciable", *Benton* v. *Maryland*, 395 U.S. 784, 788 (1969), and the controversy must be live at the time the Court reviews the case. *Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975). If a case is moot, the Court lacks jurisdiction under Article III to review the case. *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403, 407 (1972).

The constitutionality of the Camden ordinance must be reviewed "as it now stands, not at it once did." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). Changes in a challenged provision of law which eliminate the features complained of will moot the controversy. In *Hall* v. *Beals*, *supra*, the appellants challenged a six month residency requirement for voting in a presidential election as prescribed by Colorado law. The Colorado Legislature reduced the residency requirement to two months. Since the appellants would have qualified to vote if the two month requirement had been in place at the time of the election, the case "lost its character as a present, live controversy that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." *Id.* at 48. So too here, appellant's challenge to the durational residency requirement of the Camden ordinance no longer represents a present, live controversy and the appeal on that issue should be dismissed.

The decisions in *Sosna* v. *Iowa*, *supra*, and *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), do not militate against dismissal of the portion of the appeal challenging the durational residency requirement in the 1980 Camden ordinances. In both cases, durational residency requirements were challenged by individuals as representatives of a

class of persons. By the time their cases reached the Court, the named plaintiffs in *Dunn* and *Sosna* had satisfied the challenged durational residency requirements by residing in their respective states for the prescribed periods. Although the cases were moot as to the named plaintiffs, the issues remained alive as to the other members of the class. Therefore, the controversy was one which was "capable of repetition, yet evading review." *Dunn* v. *Blumstein, supra* at 333, n. 2, quoting from *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515 (1919).

Unlike *Dunn* and *Sosna,* in the matter at bar there as been an intervening change in the law which has eliminated the provision challenged. Dismissal is not required because any members of unions which form the Council have now met the twelve month durational residency requirement, but rather because the twelve month durational residency requirement has been eliminated by adoption of an amendatory ordinance. Furthermore this is not a continuing controversy likely to recur in the future. The amendatory action of the Camden City Council renders the appeal on this issue moot, and requires dismissal. *Hall* v. *Beals, supra.*

B. The Camden ordinance, as amended, establishes a bona fide residency requirement that does not contravene the Equal Protection Clause.

This Court, in *Martinez* v. *Bynum, supra,* held that the State of Texas had not violated the Equal Protection Clause by restricting attendance in free public schools to bona fide residents. The Court reaffirmed the well established distinction between a bona fide residency requirement and a durational residency requirement. *See Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 255

(1974), and *Shapiro* v. *Thompson*, 394 U.S. 618, 636 (1969). A bona fide residency requirement, properly defined and uniformly applied, does not implicate the constitutional right of interstate travel because "any person is free to move to a State and establish residency there." *Id.*, 103 S.Ct. at 1842-1843. So long as the bona fide residency requirement does not deny nonresidents a fundamental right under the Constitution, the question "is simply whether there is a rational basis for it." *Id.*, n. 7.

The Camden ordinance as amended clearly establishes a bona fide residency requirement for enjoyment of a hiring preference on the City's construction projects. A bona fide residency requirement may include two criteria: an individual must live in the jurisdiction, and the individual must have a bona fide intention to remain there. *Martinez* v. *Bynum, supra,* 103 S.Ct. at 1844. Under the Camden ordinance, an individual need *only* demonstrate that he or she resides in the City of Camden. Clearly, the definition for residency in the Camden ordinance meets the test of *Martinez* v. *Bynum, supra,* as a properly defined bona fide residency requirement.

Since the bona fide residency in the Camden ordinance requirement does not deny to those who are not residents of the City any fundamental right guaranteed by the Constitution, it need only be shown that requirement has a rational basis. Workers on the City's construction projects are, for all practical purposes, "working for the City," *White* v. *Massachusetts Council of Construction Employees, supra,* 103 S.Ct. at 1046, n. 7, and it is well established that there is no fundamental constitutional right to government employment. In *Massachusetts* v. *Murgia, supra,* the Court stated:

> This Court's decisions give no support to the proposition that a right of governmental employment

> *per se* is fundamental. . . . Accordingly, we have expressly stated that a standard less than strict scrutiny "has consistently been applied to state legislation restricting the availablity of employment opportunities." [*Id.* at 313, quoting from *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)]

The *Murgia* Court reaffirmed the principle that legislation affecting availability of employment opportunities need not be subject to strict scrutiny, and that heightened scrutiny was not required simply because employment opportunities involved governmental employment. Whether viewed as a right to seek employment generally, or the right to seek employment on a governmental sponsored public works project, the right is not fundamental for purposes of the Equal Protection Clause.

There is clearly a substantial interest on the part of the City of Camden in assuring that at least *some* of the employment opportunities available on the City's construction projects are enjoyed by residents of the City. Standing alone, this is a rational basis for limiting enjoyment of the proportional hiring preference to City residents. *Martinez* v. *Bynum, supra.* Moreover, as the Supreme Court of New Jersey stated in its opinion below, there are further independent justifications for a hiring preference favoring local residents on local public works contracts in the City of Camden. The City of Camden is one of the older urban centers of New Jersey. Over the last three decades its industrial and commercial values have declined, with the resulting adverse impact upon employment opportunities. The unemployment rate in the City generally averages two or three times the national rate. *Camden* v. *Skokowski,* 88 N.J. 304, 305, 441 A.2d 741, 742 (1982). According to the June 23, 1983 ordinance, unemployment in Camden at

that time was 19.1% as reported by the New Jersey Department of Labor.

The City of Camden is also a City with a substantial minority population. Members of recognized minority groups represent between 75% and 90% of the City's population. According to the 1980 United States Census Bureau statistics, approximately 53% of the City's residents are Black Americans, and about 20% are Hispanic Americans. In its June 23, 1983 ordinance, the City Council again noted that as of the end of 1977, unemployment among Black Americans in the State of New Jersey was 18.4% and among Hispanic Americans was 15.6%. The Council noted that these figures had increased significantly since the end of 1977.

As the Supreme Court of New Jersey stated in its opinion below, the pressing need for economic revitalization and the severe unemployment confronting the population of Camden demonstrate the rationality of the City's resident hiring preference. It is certainly not irrational for the City to presume that a hiring preference for the City's residents will help alleviate the unemployment problem in the City. What is more, the hiring preference for residents was adopted by Camden as part of the Camden affirmative action program, and the hiring preference was simply another means towards fostering participation by the large minority population of Camden in the work force on the City's construction projects. The Supreme Court of New Jersey expressly held that because members of minority groups represented between 75% and 90% of the Camden population, the obligation to make efforts to utilize City residents as employees on the City's public work projects would increase the likelihood that the City's contractors would meet the City and the State's minority hiring goals (A12). In

addition, the resident hiring preference will supply an incentive for better performance and advance the economy of the City (A27 to A28).

These are not illegitimate goals. It is true, as the Council states, that the problem of unemployment is of national scope (Appellant's Brief at 62). However, the Council ignores the acuteness of the problem in a place such as Camden which has experienced three decades of economic decline, and which has an extensive minority population among which unemployment is unusually severe. It is certainly rational for the City of Camden to adopt a bona fide residency requirement for a hiring preference on its construction projects as a means to reduce its severe unemployment, provide a measure of economic revitalization, and to further the goal of increasing participation by its large minority population in the City's public works construction. Clearly, the bona fide residency requirement does not violate the Equal Protection Clause.

C. In the event that the Court does not dismiss the appellant's constitutional challenge to the durational residency requirement in the 1980 Camden ordinances, the Court should conclude that the requirement was not violative of the Equal Protection Clause because it did not penalize the exercise of the right of interstate travel and is rationally related to legitimate governmental interests.

In *Shapiro* v. *Thompson, supra,* the Court held that a State statute which denied welfare assistance to individuals who had not resided in the State for one year preceding their application for assistance violates the Equal Protection Clause. The durational residency requirement was viewed as penalizing those who exercised their right to travel, and therefore could be upheld only if it served a compelling governmental interest. Not-

withstanding its holding, the Court made clear that it was not establishing a rule that *all* durational residency requirements were invalid. Not all durational residency requirements penalize the exercise of the right of interstate travel. Even those that do may nevertheless not violate the Equal Protection Clause if they are justified by compelling governmental interests. *Id.*, 398 U.S. at 638, n. 21.

The Court's decisions in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) and *Memorial Hospital* v. *Maricopa County*, *supra*, further explained that a classification will be held to penalize persons who have exercised their right to interstate migration if the classification involves the denial of a fundamental right, *Dunn* v. *Blumstein*, *supra* (Durational residency requirement impaired the exercise of the fundamental right to vote), or involves the denial of a basic necessity of life. *Memorial Hospital* v. *Maricopa County*, *supra* (Durational residency requirement impaired ability to secure emergency medical care). The Court emphasized that the rule was limited to basic necessities of life because "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Id.*, at 260. Indeed, the Court noted that it had upheld statutes requiring one year of state residence as a condition to preferential tuition rates at state institutions of higher education. *See Starns* v. *Malkerson*, 326 F.Supp. 234, 238 (D.Minn. 1970) (three judge court), aff'd 401 U.S. 985 (1971). In the Court's view, the tuition cases had correctly concluded that a basic necessity of life involved only food, clothing and shelter and the immediate and pressing need for preservation of life and health. *Id.* 415 U.S. at 260, n. 15, quoting from *Kirk* v. *Board of Regents*, 273 Cal. App.2d 430, 440, 78 Cal. Rptr. 260, 266-267 (1969), app. dism. 396 U.S. 554 (1970).

In *Sosna* v. *Iowa*, 419 U.S. 408 (1975), the Court rejected an equal protection challenge to an Iowa law which imposed a one year durational residency requirement as a condition to instituting an action for divorce. The Court held that the waiting period requirement did not irretrievably foreclose the appellant from

> . . . obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in *Maricopa County*. She would eventually qualify for the same sort of adjudication which she demanded upon her arrival in the state [*Id* at 407].

The Court also emphasized the significant State interests involved in the waiting period requirement. The regulation involved the area of family relations "an area that has long been regarded as a virtually exclusive province of the States." *Id.* at 404. The consequences of a divorce decree are such that the state could insist upon a modicum of attachment to the State. Moreover, a waiting period served as a means for Iowa to ensure that its divorce decrees are insulated from the likelihood of collateral attack in other states by establishing a nexus justifying the exercise of state court jurisdiction to determine the legal relationship of the parties. *Id.* at 407.

The durational residency requirement that was once a feature of the Camden ordinance does not warrant strict scrutiny under the test set forth in *Shapiro* v. *Thompson, supra.* The durational residency requirement does not penalize those who have exercised the right of interstate travel by denying either a right deemed fundamental or by impairing access to a basic necessity of life. As argued above, there is no fundamental right to seek employment on all rather than some of the Cam-

den public construction projects. *Supra* at 13-14. The ability to seek employment on all rather than a proportional amount of the available positions does not deny a basic necessity of life which is critical for the preservation of life and health. As explained in *Kirk* v. *Board of Regents, supra,* cited with approval in *Memorial Hospital, supra*:

> . . . The residence requirement in *Shapiro* could cause great suffering and even loss of life. The durational residence requirement for attendance at publicly financed institutions of higher learning [does] not [involve] similar risks. Nor was petitioner . . . precluded from the benefit of obtaining higher education. Charging higher tuition fees to nonresident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents.

Similarly, in this matter the durational residency requirement does not preclude individuals who have resided in the City for less than a year from seeking employment in construction work which is not undertaken for or on behalf of the City. There is no showing in this matter that new residents in Camden were shut out from all employment opportunities in the construction field in Camden during the period when the durational residency requirement was in effect. Moreover, by its terms, the durational residency requirement, like the resident hiring preference, applied only to 40% of the available positions on the Camden projects and newly arrived residents were free to seek employment on the remaining 60% of the available jobs.*

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* These limitations are not without significance. The record in this case does not disclose whether any of the Council's members were disadvantaged in any way by the durational residency requirement. It may very well be true that no individual member of any labor organization represented by the Council was denied employment on a Camden City construction project by reason of the durational residency requirement challenged in this case.

It is clear therefore that the durational residency requirement in the Camden ordinance need not be "shown to promote a compelling governmental interest." *Shapiro* v. *Thompson, supra* at 634. Rationality is sufficient to meet the equal protection challenge, and there was a clearly rational basis for the City to have adopted a one-year durational residency requirement as a condition for enjoyment of the resident hiring preference. It is important to emphasize that the durational residency requirement relates to the City's own construction contracts, contractual arrangements which are infused with the State's proprietary interest. A durational residency requirement as a condition to enjoying a hiring preference furthers a substantial interest on the part of the City because those who qualify for the preference will have demonstrated a clear commitment to the City by residing there a year or more. This commitment will be an incentive for better performance as a worker on the City's projects.

In addition, the Camden resident hiring preference was adopted with a view toward reducing the severe unemployment of those who reside in Camden. The unemployment problem is not new to a declining urban area such as Camden which has experienced economic decline over the last three decades. It is fair to say that the high unemployment rates reflect the joblessness of many who have resided in Camden over the years and who lack the wherewithall to travel to other places where employment opportunities are greater. Given the rate of joblessness in Camden generally, it is fair to assume that the ranks of the City's unemployed include large numbers of people who have recently come to Camden seeking job opportunities.*

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* It is important to note that in 1980 when the City adopted the durational residency requirement, unemployment in the City was 11.5% (A36). As of June of 1983, when the City Council amended its ordinance, the unemployment rate in the City had risen to 19.1%.

It is therefore reasonable for the City to assume that its unemployment problem is one that primarily effects its long-term residents. It is rational for the City to establish a limited hiring preference with a durational residency requirement of a year because if all of the job opportunities are taken by residents new to the City, who have come solely for the purpose of working on the City projects, there will be little prospect of lessening the severe unemployment situation in the City. Clearly, it is not irrational for the City of Camden to take this limited step in endeavoring to provide its long-term citizens with a small part of the benefits that flow from City-sponsored construction projects. The City's durational residency requirement was rationally based and, therefore, did not violate the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of New Jersey that the Camden resident hiring preference did not violate the Privileges and Immunities Clause should be affirmed. That portion of the appeal relating to the durational residency requirement should be dismissed as moot, or if not dismissed, the Court should conclude that the durational residency requirement as well as the bona fide residency requirement in the hiring preference do not contravene the Equal Protection Clause.

Respectfully submitted,

IRWIN I. KIMMELMAN.
Attorney General of New Jersey,
Attorney for Appellee, Department of Treasury, State of New Jersey.

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